IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1315 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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LALCHAND BHAGWANDAS SINDHI - Applicant(s)
Versus
KAUSHALYA LALCHAND & 1 - Respondent(s)

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Appearance :
MR DR BHATT for Applicant(s) : 1,
None for Respondent(s) : 1,
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 23/08/2007

ORAL JUDGMENT

1. By way of this petition under Article 227 of the Constitution of India, the petitioner – husband –

original opponent has prayed for an appropriate order quashing and setting aside the judgment and order dated 13.03.2007 passed by the learned Principal Judge, Family Court No.1, Ahmedabad in Misc. Criminal Application No. 3095 of 2003 ordering the petitioner to pay maintenance of Rs.3000/- per month to respondent No.2 herein with effect from 23.12.2003.

2. Respondent No.2 herein – Wife of the petitioner submitted Misc. Criminal Application No. 3095 of 2003 before the learned Family Court No.1, Ahmedabad under Section 127 of the Criminal Procedure Code to increase maintenance from Rs.500/- to Rs.5000/- p.m. contending *inter-alia* that she submitted application for maintenance under Section 125 of the Criminal Procedure Code in the year 1991 by way application No. 205 of 1991 and the learned Metropolitan Magistrate passed an order to pay maintenance to her at the rate of Rs.500/- per month and Rs.350/- p.m. to her son. It was submitted that more than 12 years have passed and looking to the price rise, it was requested to enhance amount of maintenance to Rs.5000/-. It was contended that the petitioner is having cloth shop in name of Mohan Cut piece, having one shop of Cycle Stores at Lunawada

and is having another shop of selling tyre tubes etc. and out of which the petitioner is earning Rs.50,000/- per month. Respondent No.2-original applicant was examined on oath below Exh.8. However, the petitioner did not remain present and therefore, his right to cross examine original applicant was closed. That thereafter the case was adjourned for recording the evidence on behalf of the petitioner, however, the petitioner did not remain present and his right to submit evidence was closed and, thereafter, considering uncontroverted evidence of original applicant, learned Family Court, Ahmedabad passed an order enhancing maintenance from Rs.500/- to Rs.3000/- from the date of application i.e. 23.12.2003. Being aggrieved and dissatisfied with the same, the petitioner has preferred the present petition under Article 227 of the Constitution of India.

3. Mr.D.R.Bhatt, learned Advocate appearing on behalf of the petitioner has vehemently submitted that learned Family Court has materially erred in not properly considering the provisions of Section 127 of the Cr.P.C. and has materially erred in enhancing the maintenance amount from Rs.500/- to Rs.3000/- per

month. It is submitted that the learned Family Court has also further materially erred in enhancing amount of maintenance retrospectively i.e. from 23.12.2003. It is submitted that even if the contention on behalf of the original applicant is accepted then also the application would have been allowed with effect from passing of judgment dated 13.03.2007 and not from the date of application and therefore, it is submitted that grave injustice is caused to the petitioner. It is also submitted that there are no change circumstances in the income of the petitioner and it is incorrect statement that the income of the petitioner is Rs.50,000/- per month. Therefore, it is requested to allow the present application.

4. On the other hand Mr.Mengdey, learned APP while opposing the petition has submitted that ample opportunity was given to the petitioner but the petitioner never appeared before the learned Family Court and right to cross examine respondent - Wife was closed and thereafter, though the matter was adjourned time and again for the purpose of recording evidence on behalf of the petitioner but still the petitioner did not remain present before the learned Family Court, therefore, learned Family Court was

constrain to pass order to close right of the petitioner to lead evidence and both the aforesaid orders are not challenged. Therefore, it is submitted relying upon uncontroverted evidence of the original applicant the learned Family Court has passed the order, it cannot be said that the same is illegal. It is submitted that even the order was passed to pay maintenance at the rate of Rs.500/- in the application filed in the year 1991, the order was passed in the year 1995 and more than 12 years have passed; that considering the price rise in between, the same can be said to be change circumstances and therefore, the learned Family Court has rightly enhanced the amount of maintenance in application under Section 127 of the Cr.P.C. Therefore, it is requested to dismiss the present application.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. It is required to be noted that respondent No.1 submitted application for maintenance under Section 127 of the Cr.P.C. in the year 1991 and same came to be allowed, the learned Magistrate passed an order to pay maintenance of Rs.500/- per month in the year 1995. That thereafter, in 2003 respondent no.1

submitted application under Section 127 of the Cr.P.C., for enhancement of maintenance looking to the price rise and standard of living etc. by submitting that the petitioner is earning Rs.50,000/- per month. It is required to be noted that respondent No.1 original applicant was examined on oath, however, as the petitioner did not remain present, the petitioners' right to cross examine respondent No.1 -original applicant was closed and the said order has also not been challenged. Even thereafter also the matter has been adjourned time and again, however, the petitioner did not remain present, therefore, his right to lead evidence also came to be closed and the said order has become final. Under the circumstances and considering uncontroverted evidence of respondent No.1 on oath, when the learned Family Court has passed an order enhancing maintenance in application filed under Section 127 of the Criminal Procedure Code, it cannot be said that the learned Family Court has committed any error, and order passed by the learned Family Court is illegal and/or contrary to evidence. The petitioner has not led any evidence in support of his income and/or the petitioner has not controverted to the statement of respondent No.1 which was on oath.

Now it is required to be noted that last order was passed in the year 1995 and respondent No.1 submitted application for enhancement of maintenance in the year 2003 and the learned Family Court passed the order in 2007, considering the same it can be said to be change circumstances and maintenance amount is required to be increased considering price rise etc. from time to time. Under the circumstances, it cannot be said that there are no change circumstances, which warrants any interference in enhancing the amount of maintenance in application under Section 127 of the Cr.P.C.

7. So far as the contention on behalf of the petitioner that even if what is stated by respondent No.1 is to be treated as true and correct, then also the learned Family Court ought not have passed the order enhancing the amount of maintenance from the date of application and ought to have passed the order of enhancement of maintenance amount with effect from the date of order is concerned, such contention has no substance and is required to be rejected outright. The application for enhancement of maintenance has been filed in the year 2003 and the

impugned order has been passed in the year 2007. There is no fault on the part of the respondent No.1 in not disposing of the application earlier. For delay in disposing of the application, respondent-wife should not be made to suffer. Under the circumstances and even considering the provisions of Criminal Procedure Code, the learned Family Court has rightly passed the order of enhancing amount of maintenance from the date of application under Section 127 of the Criminal Procedure Code. No illegality has been committed by the learned Family Court in enhancing the amount of maintenance from the date of application under Section 127 of the Criminal Procedure Code. Under the circumstances there is no substance in the said submission. It is to be noted that this petition is filed under Article 227 of the Constitution of India, there is no jurisdictional error much less than law committed by the learned trial Court in partly allowing the application under Section 127 of the Criminal Procedure Code. No case is made out to interfere with the impugned order in exercise of powers under Article 227 of the Constitution of India.

8. For the reasons stated above, there is no

substance in the present petition, requires to be dismissed and accordingly it is dismissed.

[M.R.Shah, J.]

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